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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RAY ASKINS, et al. Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al. Defendants.	No. 12-cv-2600 W-BLM

REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT BY UNITED STATES DEPARTMENT OF HOMELAND SECURITY

INTRODUCTION

In their Opposition to the U.S. Customs and Border Protection's ("CBP") Motion to Dismiss the First Amended Complaint, Plaintiffs ask the Court to reverse its prior holding and reconsider legal arguments identical to those that the parties have already fully briefed, and that the Court has already considered and rejected. Plaintiffs offer no basis that would justify a reversal of the Court's prior holding: there has been no change in controlling law; no change in factual circumstances; they make no argument that the Court's prior holding constituted legal error; and Plaintiffs make no argument that the Court's prior holding would work a manifest injustice. Indeed the First Amended Complaint arises from the identical underlying facts that formed the basis of the originally-filed Complaint. Plaintiffs' claims have been extensively addressed over the course of this litigation and found lacking. So too with this Complaint. Plaintiffs have provided no reason for this Court to depart from the law of this case. Thus, consistent with the Court's its prior ruling upholding the CBP photography policy under the First Amendment and, the Amended Complaint should be dismissed.

ARGUMENT

I. The Court Should Dismiss the First Amended Complaint Under the Law-of-the-Case Doctrine

The principles giving rise to the law-of-the-case doctrine compel dismissal of Plaintiffs' First Amended Complaint. Plaintiffs argue that the law-of-the-case

doctrine does not bind the Court here because that doctrine does not technically impose an insurmountable bar that forbids a district court from ever reviewing a prior holding. Plaintiffs' argument ignores the principles underlying the doctrine. As Plaintiffs' own authorities make clear, the law-of-the-case doctrine is "a means of ensuring the efficient operation of court affairs" and is based on the notion "that in order to maintain consistency during the course of a single lawsuit, reconsideration of legal questions previously decided should be avoided." *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001) (citations and internal quotation marks omitted); *see also Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1060 (E.D. Cal. 2011) (noting that the law-of-the-case doctrine concerns "the practice of courts generally to refuse to reopen what has been decided" (citation omitted)). And although district courts generally have the discretion to revisit their own rulings previously made in a case, they are typically unwilling to do so *unless presented with compelling reasons to alter the outcome of a prior order*. *See, e.g., Peralta v. T.C. Dillard*, 744 F. 3d 1076 (9th Cir. 2014) (noting that pretrial rulings can be reversed where they are "based on incomplete evidence" or where "a district court realizes an earlier ruling was mistaken"); *Santa Monica Baykeeper*, 254 F.3d at 884 (affirming as valid a district court order rescinding prior order certifying interlocutory appeal in light of issues raised in brief filed by plaintiffs filed subsequent to the issuance of the certifying order); *Rocky Mountain Farmers Union*, 843 F. Supp.

2d at 1060 (reversing earlier ruling to conclude that plaintiffs' claim was not preempted by federal law, based on court's reconsideration of the proper construction of relevant statutory provisions and case law).

In this case, Plaintiffs have provided no reason whatsoever for the Court to revisit its determination as to the constitutionality of CBP's photography policy. *See* Order Grant. in Part and Deny. in Part Defs.' Mot. to Dismiss with Leave to Amend, ECF No. 42, at 11 ("Sept. 30, 2013 Order"). Plaintiffs claim that the First Amended Complaint includes new facts, such as "updates to the geographic locations at issue" and allegations about "Plaintiffs' desire and intent to resume photographing matters exposed to public view at the ports of entry." Pls.' Opp. to Defs.' Mot. to Dismiss First Amended Compl. ("Pls.' Opp."), ECF No. 70, at 13. But none of these purportedly "new facts" addresses the bases for the Court's September 30, 2013 Order. In issuing its Order, the Court had assumed that Plaintiffs were in a public forum and that the CBP photography policy encompassed matters exposed to public view. Assuming those facts to be true, the Court held that the CBP photography policy survives strict scrutiny analysis based on its findings that CBP has an "extremely compelling interest of border security," that the policy constitutes the least restrictive alternative available to CBP to advance this interest, and because the policy sufficiently protects against improper officer discretion. Sept. 30, 2013 Order at 11. Thus, any "new allegations" concerning Plaintiffs' desire to take additional

photographs from a public forum of a matter exposed to public view provides no new relevant information and no reason for the Court to revisit it prior holding.

Equally without merit is Plaintiffs' suggestion that the Court should revisit its prior ruling because the First Amended Complaint "clarifies which CBP policies are challenged" and how they supposedly violate the First Amendment. Pls.' Opp. at 13. To the extent Plaintiffs' First Amended Complaint provides any clarification in this regard, it serves only to show that Plaintiffs no longer assert a pattern and practice violation against CBP as part of their First Amendment claim; rather, they now challenge only CBP's written policies. *Compare* Compl. ¶¶ 55, 61 (alleging that CBP officers had a "practice" of violating First Amendment rights) *with* First Amended Compl. ("FAC") ¶¶ 119, 121, 124 (challenging only CBP's written policies). CBP's written policies have not changed. Thus, the First Amended Complaint challenges the exact same written policies that the Court previously upheld, and which Plaintiffs already challenged in the prior iteration of their Complaint. *See* Sept. 30, 2013 Order at 7. Plaintiffs provide no new legal arguments or cite to any changes in controlling law; indeed, Plaintiffs' claims in this regard are the exact same as the ones previously litigated and resolved by the Court's September 30, 2013 Order. *Compare* FAC ¶¶ 119, 121-22, 124 (claiming that the CBP photography policy unconstitutionally restrict photography of matters exposed to public view from exterior areas of ports of

entry and provide unlimited discretion to CBP officials) *with* Sept. 30, 2013 Order at 10-11 (rejecting these arguments in dismissing Plaintiffs' First Amendment claim).

In sum, Plaintiffs have provided no justification for this Court to ignore the law-of-the-case and to reverse its prior ruling. Accordingly, the Court should "refuse to reopen what has been decided." *See Rocky Mountain Farmers Union*, 843 F. Supp. at 1060 (citation omitted).

II. Plaintiffs' Claims Fail as a Matter of Law

As Plaintiffs concede, the Court has already "addressed [CBP's] policies in ruling on a previous motion to dismiss." Pls.' Opp. at 1. As discussed above, the Court should not revisit that prior holding. Nevertheless, should the Court entertain Plaintiffs' arguments at all, it should reject those arguments now for the same reasons it rejected them initially: even when viewed under the most stringent level of scrutiny, the policy survives a First Amendment challenge because it serves "perhaps the most compelling government interest: protecting the territorial integrity of the United States," and because it represents the "least restrictive alternative available to Defendants." *See* Sept. 30, 2013 Order at 10-11.

Plaintiffs' Opposition raises two First Amendment challenges to CBP's photography policy: (1) to the extent CBP's photography policy is applied on a public forum, it cannot survive strict scrutiny because is not content neutral and narrowly tailored to achieve a compelling government interest; and (2) to the extent CBP's

policy is applied in a non-public forum, it cannot survive a lower form of scrutiny because it is unreasonable and not viewpoint neutral. *See* Pls.' Opp. at 15-23. The parties have already filed no fewer than nine separate briefs in this case addressing these exact legal issues.[1]

The parties initially disputed the nature of the forum at issue. Defendants argued in the past, as they do now, that CBP policy restricts only unauthorized photography by individuals on port of entry property. *See* Decl. of Billy Whitford, ECF No. 27-1, ¶ 5. Because ports of entry are government facilities established to serve the vital national interest in border security, and because they are not designated for expressive activity, they should be considered as nonpublic forums. *See, e.g.*, *Ctr. for Bio-Ethical Reform, Inc. v. City of Honolulu*, 455 F.3d 910, 919-20 (9th Cir. 2006) ("Any public property that is neither a public nor a designated public forum is considered a nonpublic forum."); Defs.' Opp. to Pls. Mot. for Prelim. Inj., ECF No. 27, at 15-16 (gathering cases). Accordingly, CBP has consistently argued that the standard of review applicable to speech restrictions in a nonpublic forum should apply here. Under that standard, CBP's policy "does not violate the First Amendment as long as it is '(1) reasonable in light of the purpose served by the forum and (2)

[1] *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj., ECF No. 19, at 10-21; Defs.' Opp. to Pls.' Mot. for Prelim. Inj., ECF No. 27, at 13-22; Pls' Reply in Supp. of Mot. for Prelim. Inj., ECF No. 30, at 3-14; Defs.' Mem. in Supp. of Mot. to Dismiss, ECF No. 22-1, at 11-20; Pls.' Opp. to Defs.' Mot. to Dismiss, ECF No. 32, at 10-19; Defs.' Reply in Supp. of Mot. to Dismiss, ECF No. 33, at 2-9; Defs.' Supplemental Br., ECF No. 39, at 1-5; Pls.' Supplemental Br., ECF No. 40, at 1-7; Defs.' Am. Supplemental Br., ECF No. 41, at 1-7.

viewpoint neutral.'" *See* Defs.' Opp. to Pls. Mot. for Prelim. Inj., ECF No. 27, at 17 (citing *Ctr. for Bio-Ethical Reform, Inc.*, 455 F.3d at 920).

In addition to the nature of the forum at issue in this matter, the parties also disagreed as to whether the policy at issue was viewpoint neutral. CBP argued in the past, as it does now, that the policy is viewpoint neutral because it prohibits all unauthorized photography on ports of entry, without regard to the views of the individual seeking to take photographs. *See, e.g.*, Defs.' Mem. in Supp. of Mot. to Dismiss, ECF No. 22-1, at 18-20.

Despite CBP's arguments to the contrary, the Court held that (1) that the Plaintiffs alleged sufficient facts to establish they were on a public forum during the relevant time; and (2) that the CBP policy is not content-neutral.[2] Because the Court found that this case involves a content-based restriction on speech in a public forum, it held that Plaintiffs' First Amendment challenges must be reviewed under the strict scrutiny standard. *See* Sept. 30, 2013 Order at 10. Prior to issuing its Order of September 30, 2013, the Court afforded the parties the opportunity to brief fully the issue of whether the policy survives strict scrutiny. *See* Order to Show Cause, ECF No. 36, at 1-2. Plaintiffs presented the identical arguments they now present in their

[2] *See* Sept. 30, 2013 Order at 8 ("Plaintiffs have plausibly plead that Mr. Ramirez was in a public forum when he took the photographs at issue here"); *id.* at 9 ("Plaintiffs have sufficiently alleged that Mr. Askins was also in a public forum when he took the photographs in question"); *id.* at 9-10 (holding that the policy is "content-based because authorization depends on whether or not the CBP believes the content of the photography compromises the [agency's] mission").

Opposition. *Compare* Pls.' Supplement Br., ECF No. 40, at 1-5 *with* Pls.' Opp. at 13-23. Defendant's argued then, as they do now, that CBP's policy withstands strict scrutiny because it is narrowly tailored to significant national security and border security interests; that Plaintiffs have not alleged CBP's authorization process is overly burdensome; and that CBP's policy leaves open ample alternative channels of expression. *See* Pls.' Am. Supplemental Br., ECF No. 41, at 4-5.

In issuing its opinion upholding the constitutionality of the policy, the Court resolved the exact issues that the parties have briefed in the past and that the Plaintiffs now attempt to re-litigate. Specifically, the Court held that the policy represents the "least restrictive alternative available to Defendants." Sept. 30, 2013 Order at 10. In reaching that conclusion, the Court expressly rejected the arguments that Plaintiffs re-raise now. Specifically, the Court held that the policy is not unconstitutional because it requires advance permission to record matters of public view. *Id.* (explaining that "many issues of border security 'exposed to public view,' such as the identity of CBP officers and search techniques, would be unprotected under" a rule that applied only to matters not visible to public view). The Court further held that a more limited rule would be "impractical" and "impossible to enforce." *Id.* at 10-11. The Court also rejected Plaintiffs' concern regarding the discretion provided to CBP officials. *Id.* at 11 (holding that the policy "provides sufficient safeguard against officer discretion").

In short, Plaintiffs' Opposition raises no new law or facts that would justify a reversal of the Court's prior holding in this case. *See Rocky Mountain Farmers Union*, 843 F. Supp. at 1060; *cf.* Order Grant. in Part and Den. in Part Defs.' Mot. for Reconsideration, ECF No. 56, at 6 (observing that a Court should not reconsider a prior holding "absent highly unusual circumstances, . . . newly discovered evidence, . . . clear error, or . . . an intervening change in the controlling law") (citation omitted)). Accordingly, Plaintiffs' First Amended Complaint should be dismissed.

II. Plaintiffs Fail to Allege Injury Sufficient to Create Standing

The allegations of injury contained in the First Amended Complaint are vague and largely hypothetical and are thus insufficient to satisfy the constitutional standing requirement. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (threat of injury must be "real and immediate"). As an initial matter, the First Amended Complaint is vague as to whether Plaintiffs are attempting to assert a cause of action based on a purported fear that CBP officers will leave port of entry property and begin restricting the photography of individuals located outside of CBP-controlled areas. CBP's written policy, which is the sole basis of Plaintiffs' claims, applies only to port of entry property. *See* Whitford Decl. at ¶ 5. Thus, to the extent Plaintiffs are attempting to assert claims based on a fear of off-property enforcement, those fears are unreasonable, and plaintiffs lack standing to bring those claims. *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S. Ct. 1138, 1147-48 (2013).

Moreover, even to the extent Plaintiffs' claims are based on the fear of some future CBP action occurring on port of entry property, those injuries are conjectural and therefore insufficiently concrete to constitute an actual or imminent injury-in-fact under the standing doctrine. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 226 (2003) (finding that a threatened injury must be "certainly impending" to constitute an injury in fact). Neither Plaintiff has asserted that CBP has rejected a request to photograph port of entry property or that CBP has taken any action against them in the four years since this case was filed. *See, e.g.*, *Fernandez v. Leidos, Inc.*, No. 2:14-cv-02247-GEB-LJN, 2015 WL 5095893, at *7 (E.D. Cal. Aug. 28, 2015) (holding that, "in light of the fact . . . that now almost four years has elapsed since the [alleged misconduct], Plaintiff has not shown that any alleged risk of future [injury] . . . is imminent"); *In re Zappos.Com, Inc.*, No. 3:12-cv-00325-RCJ-VPC, 2015 WL 3466943, at *8 (D. Nev. June 1, 2015) ("[T]here must be a point at which a future threat can no longer be considered certainly impending or immediate despite its still being credible . . . . The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial."). Plaintiffs' allegations of a "subjective chill" of potential future First Amendment activity are thus not adequate to confer standing. *See Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court dismiss Plaintiffs' First Amended Complaint.

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Respectfully Submitted,

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